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Implications of *Democratic Republic of the Congo v. Belgium* on the *Pinochet* Precedent: A Setback for International Human Rights Litigation?

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In 1999, the British House of Lords issued a landmark decision abrogating Augusto Pinochet's immunity under international law as a former head of state, declaring him subject to extradition for the crime of torture.[1] The former Chilean dictator was eventually declared too ill to stand trial and returned to Chile. Still, the Law Lords' decision was hailed as a major breakthrough by the international human rights community, and spawned a campaign to bring heads of state and other leaders accused of human rights abuses to trial in foreign courts.

The *Pinochet* decision brought to the fore the tension between the increasingly broad reach of international human rights law and the fundamental international law principle of sovereign equality.[2] Criticism of the decision ranged from the basic notion that this was an impermissible abrogation of Chile's sovereignty, to the more nuanced argument that international prosecution of former dictators would detract from certain nations' abilities to make the transition from dictatorship to democracy.

This year, the International Court of Justice ("ICJ"), in *Democratic Republic of the Congo v. Belgium*, had the opportunity to consider a similar issue—whether Belgium could bring Congo's Minister for Foreign Affairs, Abdoulaye Yerodia, to trial in its courts for alleged "crimes against humanity."[3] The ICJ denied Belgium's claim on the

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1. See *Regina v Bow Street Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147 (House of Lords 1999) (hereinafter *Pinochet II*).

2. Head of state and diplomatic immunity are derivative of sovereign equality among nations. See *The Schooner Exchange v McFaddon*, 11 US (7 Cranch) 116, 136 (1812) ("This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation. ... One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.").

3. *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, 2002 ICJ General List No 121 (Feb 14, 2002) (hereinafter *Congo v Belgium*), available online at

specific ground that incumbent Ministers for Foreign Affairs are immune from criminal suit abroad, notwithstanding allegations of having committed "war crimes" or "crimes against humanity."[4] By clarifying that the *Pinochet* precedent does not extend by force of logic to incumbent officials, *Congo v. Belgium* has already had a real world impact—causing the Belgian Court of Appeals to dismiss the prosecution of Israeli Prime Minister Ariel Sharon for war crimes, which had been brought under the same statute that authorized the Yerodia prosecution.[5] It may also have a broader effect.

The main holding of *Congo v. Belgium* is technically consistent with *Pinochet*, insofar as the ICJ ruled on the immunity of *incumbent* rather than *former* officials. The reasoning of the ICJ, however, is in serious tension with that of the Law Lords, and the opinion could even be read as a rejection of *Pinochet*. Insofar as *Pinochet* was considered by many to represent a sea change in the international law on official immunity, the ICJ opinion casts doubt on this belief.

This development will consider the impact of the *Congo v. Belgium* decision on the *Pinochet* precedent and the law on official immunity for serious international crimes. Part I will briefly review the legal bases for the *Pinochet* decision. Part II will lay out the legal bases of the majority opinion in *Congo v. Belgium*, and examine what of *Pinochet* survives that opinion. Part III will examine the main *Congo v. Belgium* concurrence and highlight its attempt to salvage the *Pinochet* precedent—an attempt which throws into relief the fact that *Pinochet* has, in fact, been undercut.

I. PINOCHET

In October 1998, a Spanish court issued an international arrest warrant against Augusto Pinochet for acts of torture, hostage taking, and other conduct carried out during his reign of power in Chile, invoking universal jurisdiction as a basis for its action. Pinochet, who had entered Britain for back surgery in September 1998, was arrested by British authorities pursuant to the Spanish warrant. Pinochet's challenge to this action eventually reached the House of Lords, where a majority of the Law Lords found that, despite his status as a former head of state, Pinochet was not entitled to immunity from arrest and extradition on the specific charges of torture and conspiracy to commit torture.[6]

<http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_toc.htm> (visited Sept 15, 2002).

4. Id at ¶¶ 54, 58.

5. See *Arret de la Cour D'Appel de Bruxelles, Sharon Ariel, Yaron Amos et autres*, art 136 bis, al 2 et 235 bis CIC (June 26, 2002) (hereinafter *Sharon*).

6. Under traditional principles of international law, Pinochet, as a former head of state, would have been expected to enjoy immunity *ratione materiae*, a subject matter immunity that prevents the official acts of one state from being called into question in the courts of another. See Ian Brownlie, *Principles of Public International Law* 330–31 (Clarendon 3d ed 1979).

In order to reach the issue of whether Pinochet enjoyed immunity under British law, the Law Lords had to first interpret the relevant international law.[7] As a result, the *Pinochet* ruling has international legal value beyond the UK. The reasoning used by the various Law Lords, however, is often vague and somewhat contradictory,[8] making it difficult to divine the exact legal impact of the decision.

Six Law Lords found that Pinochet did not enjoy immunity for the torture charges. Of these, four rested their reasoning on the grave nature of the underlying crime: Lords Hutton and Millett seemed to believe that Pinochet's immunity was abridged because of torture's status as a *jus cogens* crime;[9] Lord Browne-Wilkinson asserted that Pinochet's immunity was abrogated because torture is a "fully constituted international crime";[10] and Lord Hope reasoned that Pinochet's immunity was abrogated because, though torture per se was not a serious international crime, the *alleged* torture was "on such a scale as to amount to an international crime."[11] In other words, Lords Hutton, Millett, Browne-Wilkinson and Hope all seem to agree that Pinochet's immunity somehow melted away in the face of torture's status as a "serious international crime"—whether established as such by *jus cogens* or international treaty.

The remaining two Law Lords took alternate approaches: Lord Saville rested his conclusion on a theory of implied waiver of immunity, asserting that the UN Convention Against Torture, which had been ratified by Britain, Spain and Chile, per se abrogated Pinochet's immunity.[12] Lord Phillips, perhaps most radically, reasoned that because national jurisdiction over universal crimes under international law was so new, traditional immunities did not apply.[13]

Note that five of these six nonetheless were of the opinion that *current* heads of state continue to enjoy absolute immunity under international law for acts of torture—though they failed to provide any reason for their conclusion.[14] This

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7. The Law Lords interpreted Britain's State Immunity Act as incorporating developing international law standards.
8. The House of Lords issued its opinion *in seriatim*; while there was a clear majority as to the outcome in the case, each Lord presented his own basis for the outcome.
9. See, for example, *Pinochet II* at 251–65 (cited in note 1) (Lord Hutton). Lord Millett also subscribed to this view. Id at 275.
10. See id at 204 (Lord Browne-Wilkinson).
11. See id at 246 (Lord Hope).
12. See id at 266–67 (Lord Saville), referring to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment ("Torture Convention"), art 1, S Treaty Doc No 100–20 (1988), 1465 UNTS 85 [or General Assembly Res No 39/46, UN Doc No A/RES/39/46 (1984)]. Several other Lords believed that the Torture Convention played some role in the abrogation. See Curtis A. Bradley and Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 Mich L Rev 2129, 2140–43 (1999).
13. See *Pinochet* at 284–90 (cited in note 1) (Lord Phillips).
14. Lords Hutton, Millett, Phillips, Saville and Browne-Wilkinson.

concession provides a narrow basis on which to conclude that *Congo v. Belgium* is in line with *Pinochet*.

II. CONGO V. BELGIUM AND ITS IMPACT ON PINOCHET

One of the direct effects of the *Pinochet* decision was to embolden Belgium to issue an arrest warrant for Congo's Minister of Foreign Affairs, Aboulaye Yerodia, for crimes against humanity, in connection with the delivery of hate-filled speeches in August 1998 during the Tutsi-Hutu conflict which incited acts of mass murder.[15] The cases are directly analogous: as in *Pinochet*, in *Congo v. Belgium* we see a former colonial power (Belgium) concerned with atrocities allegedly committed in its former colony (Congo) by a government official (Yerodia), invoking universal jurisdiction to attempt to bring him to justice. But Belgium was not as successful as Spain in this effort. The ICJ disposed of Belgium's case based on the fact that, at the time Belgium issued its warrant, Yerodia was an *incumbent* Minister of Foreign Affairs.[16] By declining to extend the *Pinochet* precedent to incumbent, as well as former, officials, the ICJ made it clear that *Pinochet* did not mark a turning point in the international law on official immunity. Further, the basis upon which it ruled suggests that *Pinochet* is no longer sound precedent.

The Court ruled that under customary international law ("CIL"), incumbent Foreign Ministers are immune from criminal jurisdiction abroad.[17] Using quite formal, function-driven analysis, the Court noted that CIL accords Ministers of Foreign Affairs immunity "not ... for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States."[18] It follows, the Court concluded, that because arrest or threat of arrest abroad while in office for any offense—whether committed before or during the Minister's term in office, in an official or private capacity—would impede a Minister from effectively performing his or her official functions, jurisdiction over such officials was against international law.[19]

On its face, this holding is consistent with *Pinochet*, insofar as five out of the six Law Lords who believed Pinochet's immunity to have been abridged stated that the

15. This occurred in the context of the ethnic warfare between the Tutsis and the Hutus that was at the heart of the Rwandan civil war. During that conflict, mobs were induced to genocidal action through, for example, inflammatory broadcasts on government radio stations. For a description of the climate at the time, see Philip Gourevitch, *We Wish to Inform You that Tomorrow We Will Be Killed with Our Families: Stories from Rwanda* (Farrar 1998).

16. Though at the time the case was argued he was no longer in office, the court decided the case as if he were.

17. See *Congo v Belgium* at ¶¶ 53–54 (cited in note 3) ("The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability."). See also id at ¶ 53 (laying out the functional reasons that this must be the case).

18. Id at ¶ 53.

19. Id at ¶¶ 53–55.

immunity of incumbent heads of state nonetheless remains intact. Yet it is at least in serious tension with *Pinochet*, which failed to consider the functional concerns that drove the ICJ's opinion here. Further, *Congo v. Belgium* could even be read as a rejection of *Pinochet*, as it (a) rejects as CIL the basis on which four of the six Law Lords came to their conclusion, and (b) does not acknowledge as legal the international prosecution of a former head of state where neither the state itself, nor the international community, has given leave for such prosecution.

First, the majority opinion in *Congo v. Belgium* casts doubt on whether, as the Law Lords alleged in *Pinochet*, a CIL norm has emerged abrogating official immunity for "serious international crimes." Recall that four of the six Law Lords held that Pinochet's immunity was abrogated because of torture's status as a "serious international crime" in one form or another.[20] Belgium attempted to cite this aspect of *Pinochet* as persuasive legal precedent for the proposition that incumbent immunity does not hold up in the face of "serious international crimes," contending "that an exception to the immunity rule was accepted [in *Pinochet*] in the case of serious crimes under international law."[21] The ICJ dismissed this argument, and concluded that it was "unable to deduce from this practice that there exists under CIL any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."[22]

Second, the majority in *Congo v. Belgium* laid out four circumstances under which high officials could be prosecuted internationally—and *did not* include the circumstances of the Pinochet prosecution in this exposition. This pregnant silence further undercuts the precedential value of the *Pinochet* decision.

While dismissing the Yerodia prosecution, the majority took pains to point out that its holding was not meant to shield *all* high officials indefinitely.[23] Such persons, it noted, enjoy no criminal immunity under international law under four specific circumstances: (i) if charged within their own countries; (ii) if their own state has explicitly waived immunity; (iii) "in respect of acts committed prior or subsequent to his or her period of office, [or] in respect of acts committed during that period of office in a private capacity"; or (iv) if a properly constituted international tribunal, such as the International Criminal Tribunal for the former Yugoslavia or the International Criminal Court, established pursuant to a UN resolution or

20. See part I.

21. See *Congo v Belgium* at ¶ 56 (cited in note 3).

22. Id at ¶ 58.

23. Id at ¶ 60 ("The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed ... Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.").

international treaty with a specific grant of jurisdiction over that person, were convened.[24] It should be noted that this list maps out only traditionally accepted boundaries of official immunity, maintaining a high level of concern for state sovereignty.[25]

Notably absent from this list is a scenario close to that under which Pinochet's immunity was abrogated by the Law Lords. Pinochet was prosecuted abroad, by the court of a country that had been granted no leave by the international community to pursue him. Chile had not explicitly waived Pinochet's immunity: thus Lord Saville's theory that signing the Torture Convention was an implied waiver would be insufficient in the eyes of the ICJ. And while the First and Second Law Lords had advanced the theory that Pinochet's crimes were so heinous that they could not be considered to have been committed in his "public" capacity,[26] this is, at best, a creative characterization of the capacity in which Pinochet was acting, and not acknowledged in the exceptions to immunity *ratione materiae* laid out by the majority in exception (iii).

Thus, if the *Pinochet* case came up today, it would be difficult to argue that Spain could legally prosecute the former dictator under any of the main theories employed by the Law Lords. The ICJ has rejected the notion put forward by Lords Hutton, Millett, Browne-Wilkinson and Hope that CIL now tells us that official immunity fades away in the face of serious international crimes. And by failing to include the Pinochet scenario in its list of situations in which high officials can be prosecuted, the ICJ has cast the theories of the other Law Lords in doubt.

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24. Id at ¶ 61.

25. With regard to the first exception, officials charged within their own countries have never enjoyed immunity under international law. With regard to the second, because official immunity derives from sovereign immunity, it is accepted that explicit state waiver is sufficient to abrogate immunity. See, for example, *In re Doe v United States*, 860 F2d 40, 45 (2d Cir 1988) (holding that the Philippine government's waiver of Ferdinand and Imelda Marcos's head-of-state immunity was sufficient to strip them of that immunity). The third exception simply maps those circumstances in which immunity *ratione personae*—a status immunity that attaches to a high official while in office for the purpose of allowing him to perform that office—traditionally does not apply. See Brownlie, *Principles of Public International Law* at 330–32 (cited in note 6). Only the fourth exception acknowledges a situation in which an official's immunity might be abrogated without regard to his state's sovereignty concerns. However, such prosecutions have been an accepted part of the international legal landscape since Nuremberg, and are firmly limited here to instances where the international community has made a formal decision driven by the exigencies of the situation to abrogate sovereign immunity.

26. See *Regina v Bow Street Magistrate, Ex parte Pinochet Ugarte*, [2000] 1 AC 61 (House of Lords 1998) (hereinafter *Pinochet I*). This theory was taken up by the main concurrence. See part III.

III. THE SEPARATE OPINION OF JUDGES HIGGINS, KOOIJMANS AND BUERGENTHAL IN *CONGO V. BELGIUM*

The main concurrence in *Congo v. Belgium*, written by Judges Higgins, Kooijmans and Buergenthal, agreed with the majority on the narrow point that incumbent officials remain immune under international law from criminal prosecution abroad.[27] Yet it goes on to air a much more expansive notion of why and under what circumstances the traditional immunity enjoyed by high officials may be abrogated—in order, perhaps, to leave room for cases such as *Pinochet*, should they arise in the future.

The concurrence starts in the same place as the majority, saying that although officials may enjoy immunity for certain acts in certain circumstances, they nonetheless do not enjoy impunity from ultimate liability.[28] But while the majority seems anxious only to avoid the accusation that its ruling is a path to impunity for culpable officials, the concurrence goes well beyond this, to assert as an emerging international norm the need to ensure that "the perpetrators of serious international crimes do not go unpunished."[29] It rejects the idea put forth by the majority that such a norm can be served by allowing prosecution to proceed within the four exceptions the majority laid out, offering instead a balancing test.[30]

Weighed in the balance are: (i) "the interest of the international 'community of mankind' in preventing impunity from grave crimes against its members"; as against (ii) "the interest of the 'community of States' in allowing State officials to act freely on the inter-State level without unwarranted interference."[31] Perhaps in a nod to the main concerns of the majority, the concurrence notes that the second, sovereignty-oriented element will never disappear off the scale, writing that the interest in preventing impunity "does not *ipso facto* mean that immunities are unavailable whenever impunity would be the outcome."[32]

According to the concurrence, the following four outcomes strike the right balance: First, arrest warrants may not be issued against incumbent Foreign Ministers,

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27. See *Congo v Belgium*, separate opinion of Judges Higgins, Kooijmans and Buergenthal (hereinafter "separate opinion") at ¶ 1 (cited in note 3) ("We generally agree with ... the conclusions [the Court] reaches.").

28. See id, separate opinion at ¶ 78 (noting, with respect to the majority's statement in ¶ 60, that "we could not agree more—that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed").

29. See id, separate opinion at ¶ 74.

30. See id, separate opinion at ¶ 75 ("A balance ... must be struck between two sets of functions which are both valued by the international community.").

31. Id.

32. Id, separate opinion at ¶ 79.

for the functional reasons behind immunity *ratione materiae*.[33] This is in agreement with the majority holding.

Second, incumbent Foreign Ministers may not be absolutely immune during *private* travels.[34] This finding is directly at odds with that of the majority, which ruled that the free movement of Foreign Ministers abroad must not be limited, whether they are traveling on personal or private business, as they must be free to communicate with their home governments and interact with officials from other governments at a moment's notice as the needs of their countries dictate. That said, it is hard to imagine, under the standard laid out by the concurrence—that Foreign Ministers "may not be subjected to measures which would prevent effective performance of the functions of a Foreign Minister"[35]—when immunity during private travels could actually be abridged.

Third, and perhaps most interestingly, incumbent officials may not be immune to suit if it becomes apparent that their government is keeping them in office for an indeterminate period to forestall prosecution.[36] No country has ever tried to assert universal jurisdiction over a de facto former official and been rebuffed by such a false front. But it is certainly conceivable that such an issue could arise, and that a prosecuting country would cite to this concurrence as support that it should be allowed to proceed. (This, remember, was in the background of the *Pinochet* case, as Pinochet had named himself "Senator for life" before stepping down.)

Fourth, the main concurrence held that Foreign Ministers and other high officials may not be immune after they leave office for "serious international crimes" committed while in office, even if those acts are part of carrying out their duties.[37] Not only does this fourth exception fit within the balancing test, but also, it would seem at first glance to fit within the third exception advanced by the majority—that officials do not enjoy immunity for acts committed during that period of office in a private capacity. Self-consciously echoing one theory advanced by the First and Second Law Lords' rulings on how Pinochet's immunity was abrogated,[38] the concurrence reasons that such crimes "cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform."[39] This, the concurrence contends, is supported by various traditional sources

33. Id, separate opinion at ¶ 83.
34. Id, separate opinion at ¶ 84.
35. Id.
36. Id, separate opinion at ¶ 78.
37. Id, separate opinion at ¶ 85.
38. See id (citing *Pinochet I* (Lords Steyn and Nicholls of Birkenhead) and *Pinochet II* (Lords Hutton and Phillips)).
39. Id, separate opinion at ¶ 85.

of CIL; in support of this notion, it cites legal commentary[40] and "State practice, as evidenced in judicial decisions and opinions"—including *Pinochet*.[41]

With this, the concurrence attempts to leave room for future prosecution of figures like Pinochet. While this is technically consistent with the majority opinion, it will be difficult for prosecutors in future human rights cases to successfully cite this aspect of the concurrence. As noted above, the majority failed to include this theory in the four exceptions it acknowledged to immunity *ratione materiae*.[42] Further, it is difficult to get around the fact that the majority, when confronted with the *Pinochet* precedent, was unable to find any evidence of CIL creating "any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."[43] The implication is that the majority does not believe that war crimes or crimes against humanity "cannot be regarded as official acts"; *a fortiori* it would not believe that "serious international crimes" "cannot be regarded as official acts."

IV. CONCLUSION

Once the taboo of prosecuting former heads of state was broken in *Pinochet*, it was unclear what role, if any, sovereignty concerns would play in the quest to bring accused officials to justice. Human rights groups, such as Human Rights Watch and Amnesty International, stepped into the breach, campaigning to bring former *and* incumbent high officials to justice. These efforts met with initial success in Belgium, with the prosecutions launched against Yerodia and Sharon.

The ICJ, in *Congo v. Belgium*, firmly put to rest the notion that incumbent high officials can be prosecuted under international law, barring explicit waiver of immunity by that official's state, or pursuant to an explicit grant of jurisdiction to an international criminal court constituted pursuant to a treaty or UN resolution. This bore fruit in the dismissal, six months later, by the Belgian Court of Appeals of the Sharon prosecution, on the grounds that, following *Congo v. Belgium*, Belgian prosecutors could not issue arrest warrants against such officials, and to try them *in absentia* was against international law.[44]

The question remains under what circumstances, if any, may *former* officials now be prosecuted? At the very least, *Congo v. Belgium* pushes the pendulum back toward a

40. Id ("It is now increasingly claimed in the literature ... that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone ... can perform.") (citations omitted).

41. Id, citing *Eichmann*, 36 ILR 312 (1962); *Pinochet* (Lords Hutton and Phillips); *Pinochet I* (Lords Steyn and Nicholls); and the *Bouterse* case, Hof 20 Nov 2000 (Neth).

42. See text accompanying note 25.

43. *Congo v Belgium*, separate opinion at ¶ 58 (cited in note 3).

44. See *Sharon* at 15 (cited in note 5).

stronger assertion of the importance of sovereignty in making these decisions. But further, the majority's rejection of the emergence of CIL around international prosecution of officials for "serious international crimes," and its pointed exclusion of the *Pinochet* scenario from situations in which such officials may be prosecuted, leaves the fate of even prosecutions of former officials in doubt. While the language of the main concurrence in the case attempts to salvage the *Pinochet* precedent, it is not clear that it was able to do so.

Whether this is a positive development is open to debate. As the Restatement of Foreign Relations Law points out, sovereign immunity and its derivatives "have been justified ... as necessary for the effective conduct of international intercourse and the maintenance of friendly relations" between nations.[45] Further, the concurrence's argument in *Congo v. Belgium* that the exceptions to official immunity allowed by the majority will not sufficiently guard against the "specter of impunity" for heinous acts is not fully supported by the historical record. In the past half century, the community of nations has several times arrived at a consensus that it will intervene to bring justice to countries incapable of providing it themselves, such as Rwanda and the former Yugoslavia. The past year has seen not just the dismissal of the Yerodia and Sharon prosecutions in Belgium, but the birth of the International Criminal Court. Finally, democracy and the rule of law are arguably on the rise in the international community, and with them domestic institutions capable of trying officials who have committed serious crimes at home.

45. Restatement (Third) of Foreign Relations Law of the United States, ch 2, Introductory Note (1986).